is conclusive,[5] a different result can hardly be looked for under the Immigration Act of 1903. To be sure, if it is granted that the person in question is a non-resident alien, the case is clear; since the power to exclude aliens is political in its nature and therefore is no part of the power vested by the Constitution in the courts.[6] But if it is disputed whether the person is in fact a non-resident alien, the decision of the executive officers should be reviewable by the courts upon a writ of *habeas corpus*. Upon the determination of this question depends the very jurisdiction of the ministerial officers, and it has always been held that the finding of facts upon which jurisdiction is based is reviewable by the courts irrespective of legislative sanction.[7] Under the rule laid down in the Chinese Exclusive Acts a citizen of the United States may be declared by a board of immigration officers to be a non-resident alien afflicted with a dangerous disease and on appeal for a judicial determination of his citizenship the best he can expect is to have his case considered by a higher executive officer whose decision, if adverse to his claim, results in his deportation from the country. The rights in question are too sacred to be decided in such a way. No citizen of the United States can be deported from the country except as a punishment for crime, and then only after a trial by jury. This constitutional right Congress cannot take away. It would therefore seem that the finding of facts upon which citizenship is based is a judicial question, and it is difficult to see how Congress through its appointed agents can determine the existence of facts upon which depends a constitutional right which Congress is powerless to disturb.

PUTATIVE MARRIAGE.— The status of legitimacy was granted more freely by the civil than the common law.[1] The civilians regarded as legitimate the issue of a marriage contracted when at least one of the parties believed the marriage to be lawful.[2] This doctrine of putative marriage formed the basis of an ingenious contention in a recent English case. *Re Stirling*, [1908] 2 Ch. 334. Two persons domiciled in Canada or Scotland were married in California after the woman's former husband had obtained in North Dakota a divorce invalid in Canada or Scotland. Their child, if legitimate, was entitled to succeed to property in Scotland, and his counsel contended that since his parents had married under a *bona fide* mistake as to Scottish law, that is, a mistake of fact, the doctrine of putative marriage applied. The court refused to decide whether that doctrine was law in Scotland or whether the parents were domiciled in Scotland or Canada, but held, following an earlier dictum,[3] that in any case the mistake as to the validity of the divorce would be a mistake of law, and hence the doctrine did not apply. In regard to the first point, the query whether the Scottish law recognizes putative marriages, there appear to be no modern decisions;[4] that they are so recognized was affirmed by the leading modern writer[4] on the subject, but his authority was impugned in the course of the argument in the principal case. Certainly the doctrine

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[5] U. S. *v.* Tee Toy, 198 U. S. 253.
[6] Fong Yue Ting *v.* U. S., *supra*. See 22 HARV. L. REV. 132.
[7] American School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94, 107–109.

[1] See 16 HARV. L. REV. 22 *et seq.*
[2] *Ibid.* 38.
[3] See Shaw *v.* Gould, L. R. 3 H. L. 55, *per* Lord Colonsay, p. 97.
[4] See Fraser, Parent and Child, 2 ed., 22 *et seq.*

has no standing in England,[5] though it has been suggested as desirable legislation.[6] In the United States[7] it naturally occurs in the Louisiana code;[8] other jurisdictions have recognized it only as part of the French[9] or Spanish[10] law. The liberal statutory regulations on this subject in almost every state, however, probably reach the same practical results.[7]

On the second point of the principal case, the broad holding that a mistake as to the legal effect of a previous divorce would not satisfy the requirements of the doctrine of putative marriage, the court seems twice misled. Tribunals administering the Napoleonic code have considered an honest misapprehension of the parent's own law sufficient to legitimize the offspring.[11] But if it be conceded that the parent's mistake must have been one of fact,[12] then the present decision, based on Lord Colonsay's suggestion[13] that foreign law is fact only for purposes of evidence, may still be doubted; for in respect to a matter of substantive law, a mistake as to foreign law has been held to be a mistake of fact;[13] and for the very purposes of applying the rule of putative marriage under the French code, a mistake by a foreign woman as to the validity of the divorce obtained by the other parent, a Frenchman, was treated as a mistake of fact.[14] This particular result was correct, since the French law determines the validity of a marriage by the law of the parties' nationality;[15] hence the foreign mother's belief as to the Frenchman's capacity was a belief as to French law, law foreign to her. But in the principal case, if the father's domicile is assumed to have been Scottish, the question of legitimacy depended upon Scottish law;[16] under Scottish law the *lex loci* governs the marriage contract;[17] therefore the parents misconstrued, if any, the law of California, and were entitled to the benefit of a mistake of fact. Such a line of reasoning apparently escaped both court and counsel in the case.

CONSIDERATION MOVING TO THE PROMISOR FROM ONE OTHER THAN THE PROMISEE. — It has long been deemed the established doctrine of the common law of England that "a stranger to the consideration can maintain no action on a contract."[1] On examination, however, the cases cited for the proposition seem to establish not so much that the plaintiff must be the source of the consideration as that he must not be a stranger to the promise.[2]

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[5] See 2 Roper, Husband and Wife, 2 ed., 465.

[6] See Geary, Marriage, xi.

[7] The so-called Enoch Arden statutes provide only for the mistaken belief as to the death of a former spouse. *Cf.* N. Y. Civ. Co. Pro., § 1745. One statute, however, provides also for a mistake as to the legality of a previous divorce. Comp. Laws of Utah, § 1185.

[8] §§ 117, 118.

[9] See *Re* Hall, 61 N. Y. App. Div. 266.

[10] Smith *v.* Smith, 1 Tex. 621.

[11] Succession of Benton, 106 La. 494. See 15 HARV. L. REV., 393; Fraser, Parent and Child, *supra*.

[12] See Fernex *v.* Floccard, Jour. du Palais, 1870, 895 n. (5), where the reporter seems to think the point an open one.

[13] Haven *v.* Foster, 9 Pick. (Mass.) 112.

[14] Fernex *v.* Floccard, *supra*.

[15] 1 Toullier, § 576.

[16] Shedden *v.* Patrick, 5 Paton App. 194.

[17] See 2 Fraser, Husband and Wife, 2 ed., 1297 *et seq.*

[1] Crow *v.* Rogers, 1 Str. 592.

[2] Am. Lead Cas. 176.